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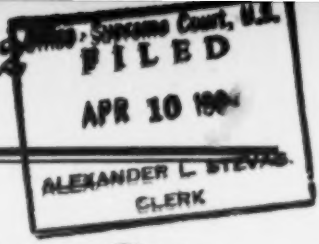

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PAPAGO TRIBAL UTILITY AUTHORITY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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April 10, 1984

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QUESTIONS PRESENTED

1. Whether the Court below erred in holding, in direct conflict with this Court's decision in *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956), that the Commission need not make public interest findings to justify a Section 206 order under the Power Act changing rates, which by contract can be changed only by its action, for the sole purpose of benefiting the utility.

2. Whether the Court below erred in retroactively implementing this new legal standard by applying it to existing contracts made under prior law.

3. Whether the Court below erred in holding, in direct conflict with the decision of this Court in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) and the decision of the Tenth Circuit in *Southern Union Gas Co. v. FERC*, 725 F.2d 99 (1984) that the Commission had implied equitable powers to make rates retroactively effective in violation of the "filed rate" doctrine and the requirement of Section 206(a) that rates prescribed by the Commission may apply only prospectively.

PARTIES BELOW

Arizona Public Service Company
Electrical District No. 1
Federal Energy Regulatory Commission
Papago Tribal Utility Authority

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NO. 83-

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Papago Tribal Utility Authority (PTUA), the petitioner below, petitions for a Writ of Certiorari to review the December 13, 1983 decision of the United States Court of Appeals for the District of Columbia Circuit in *Papago Tribal Utility Authority v. Federal Energy Regulatory Commission,* 723 F.2d 950 *(Papago II),* and the January 12, 1984 Court Order Denying Petition for Rehearing of Petitioner in the same case. Petitioner also seeks summary reversal of these court decisions and orders.

The challenged actions of the Court below affirm the January 25, 1982 Order on Remand and the March 26, 1982 Notice of Denial of Application for Rehearing issued by the Federal Energy Regulatory Commission (FERC or Commission) in response to the decision of another panel of the same Court in *Papago Tribal Utility Authority v. FERC*, 610 F.2d 914 (1979) *(Papago I)*. That earlier Court decision reversed the Federal Power Commission's (FPC) prior holding that Arizona Public Service Company (APS) could lawfully, under the terms of its contract, unilaterally increase rates to PTUA by merely filing new tariffs and rate schedules with the Commission.

OPINIONS AND ORDERS BELOW

The decision and order of the United States Court of Appeals for the District of Columbia Circuit affirming the Commission's Order on Remand of January 25, 1982 in FERC Docket No. ER76-530 is reported at 723 F.2d 950 and is reprinted in Appendix C. The Commission's Order on Remand is reported at 18 FERC ¶ 61,066 and is set out in Appendix A.[1]

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on December 13, 1983. (App. 25). On January 14, 1984, the Court of Appeals denied petitioner's motions for rehearing and for rehearing with the suggestion of rehearing en banc (App. 43-44). This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

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[1]Hereafter, references to the Appendix shall be designated (App. ___).

STATUTES INVOLVED

The statute upon which the Court of Appeals' decision is based is the Federal Power Act, 16 U.S.C. § 824 *et seq.*, the relevant portions of which appear in Appendix E.

STATEMENT OF THE CASE

Arizona Public Service Company (APS) sells electricity at wholesale (for resale to ultimate consumers), in the State of Arizona. Its wholesale rates are regulated by the FERC under the Federal Power Act (Act), 16 U.S.C. § 824 *et seq.* Papago Tribal Utility Authority is an unincorporated agency of the Papago Indian Tribe, organized to provide electrical service to the Papago Reservation. PTUA purchases all of its energy requirements from APS.

By way of background, it is necessary to delineate the differences between Sections 205 and 206 of the Act. In a trilogy of cases, this Court has established the basic pattern of regulation under both the Federal Power Act and the Natural Gas Act, 15 U.S.C § 717 *et seq.*, which are *in pari materia*, *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Sierra, supra.*; *United Gas Pipe Line v. Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958). In *Mobile*, this Court held that under these Acts the relations between the utility and its wholesale customers are established by contract and that rates could be changed by the utility, if at all, only in accordance with the rate change provisions of the contract. *Mobile*, as interpreted by *Memphis*, identified two types of contract. The first is a Section 205 contract in which the customer agrees to pay the "going rate" for service as established in the rate schedule on file with the Commission. The second is a Section 206 contract which establishes the rate, or a method of fixing the rate. These Section 206 rates or rate methods were held in these cases to be changeable only by agreement of the parties

or by a Commission order. The term "*Sierra* burden of proof" refers to a Section 206 customer whose contract can only be changed by a Commission order finding it contrary to the public interest (*Sierra* at 355).

The Hecla Mining Company and El Paso Natural Gas Company formed a joint venture to invest over $400 million to exploit copper deposits on the Papago reservation using a pollution-free process which required large quantities of electricity. PTUA and APS executed a wholesale power supply contract which had been approved by PTUA's board of directors on April 21, 1971. Section 3 of the APS-PTUA contract which governs rates established *fixed* rates to be charged to PTUA, and adjustment formulas by which specified demand and energy components of the rate would be automatically adjusted up or down *each month*. (App. 30; see also Appendix F, Section 3 and Exhibit B). APS charged PTUA for service, in accordance with the contract rate, from April 15, 1972 (when service began) and sought to change that rate only on February 6, 1976, when it filed with the FPC[2] in Docket No. ER76-530, a rate increase under Section 205 of the Act, 16 U.S.C. § 824d (Certified Record No. 82-1338, p. 599A).[3] On March 19, 1976, PTUA moved to reject APS' filing on the grounds that, since it is a Section 206 customer, APS is not permitted to unilaterally make effective a rate increase with respect to it by filing new tariffs

[2]Pursuant to Section 402(a) of the Department of Energy Organization Act, 42 U.S.C. Sec. 7172(a), the FPC's functions were transferred to the FERC. References herein to the agency action shall for the purpose of continuity be made to the agency which actually took the action. We shall also refer to the agency generically as the "Commission."

[3]References to the Certified Record in D.C. Circuit Nos. 82-1338 and 1339 shall hereafter be designated (R.____).

under Section 205 of the Act. (R.640A). On March 31, 1976, the FPC denied this motion (R.705A). On April 30, 1976, PTUA petitioned for rehearing of this order (R.747A), and on September 28, 1976, the Commission denied rehearing (R.922A).

PTUA then filed a petition for review of the March 31 and September 28 Orders with the Court of Appeals. On August 21, 1979, that Court reversed the Commission and held that PTUA is a Section 206 customer with respect to which APS may not make unilateral rate increases. *Papago Tribal Utility Authority v. FERC*, 610 F.2d 914 (1979) (hereinafter "*Papago I*"). The Court held "...that the agreements, properly construed, authorized rate revisions only by an appropriate order of the Commission in a Section 206(a) proceeding." (Footnote omitted, *Papago I* at 930). The Court then remanded the case to the Commission for further proceedings on the issue of "... whether the rigorous *Sierra* burden of proof must be employed should APS seek Commission relief pursuant to Section 206(a)." (*Papago I*, ftn. 127 at 930).

While *Papago I* was pending in the Court of Appeals, Commission proceedings were held in Docket No. ER76-530 on the assumption that PTUA was a Section 205 customer, as to which APS could unilaterally increase the rates to be charged subject only to review by the Commission, under the "just and reasonable" rate standard.

On December 19, 1977, the Administrative Law Judge (ALJ) issued an Initial Decision (R.3726) concerning just and reasonable rates for PTUA and other Section 205 customers. On August 1, 1978, the Commission affirmed the Initial Decision in almost all respects (R.4049). That decision was effective as to PTUA on May 1, 1976, the date on which APS had made its unilateral Section 205 rate

increase effective subject to refund. This Commission order was, in effect, reversed by *Papago I* which held that the Section 205 proceeding instituted against PTUA was a nullity.

After the issuance of *Papago I*, APS and PTUA both requested the Commission to issue an order on remand. APS argued that it need not meet the *Sierra* burden of proof. PTUA argued that APS must meet the *Sierra* burden and must make refunds of all amounts collected in excess of the preexisting contract rates. Alternatively, PTUA argued that if the Commission failed to interpret the language of the APS-PTUA contract so as to impose a *Sierra* burden of proof, it should reopen the record in Docket No. ER76-530 to take evidence regarding the actual intent of the parties to the contract.

In its Order on Remand, issued on January 25, 1982 (Appendix A), the Commission held that APS need not meet the *Sierra* burden of proof, denied PTUA's motion to reopen the record, made—for the first time—a finding that APS' existing contract rates to PTUA were unreasonably low and therefore unlawful under Section 206(a) and made this finding effective as of the date of issuance of its rate order of August 1, 1978 (42 months earlier). (App. 10-11). These actions were taken after the August 1, 1978 Order had been voided by *Papago I*.

PTUA's application for rehearing of this Order on Remand was denied, without opinion, on March 26, 1982 by issuance of a Notice of Denial of Application for Rehearing (App. 23). The Court's opinion of December 13, 1983 denied PTUA's petition for review. The Court held that the Power Act authorized (1) company-made rates under Section 205, (2) Commission-made rates in the exercise of its overriding power to protect the public interest under Section 206, and

(3) "just and reasonable" rates under Section 206. (App. 28-29). The Court explicitly admitted (App. 29, ftn. 5) in *Papago II* and by reference therein to the companion case of *Kansas Cities v. FERC*, 723 F.2d 82, decided by the same panel on the same day (723 F.2d 950, at 954) that its holding that the Commission had statutory power, under Section 206, to change contract rates by making "just and reasonable" findings rather than "public interest" findings was a departure from the settled law as interpreted by this Court in *Sierra*, and as understood by all concerned *(i.e.*, the parties to the contracts and the Commission).

The Court also found that the Commission had interpreted the language of the APS-PTUA contract on remand as authorizing "a Commission-initiated proceeding to set just and reasonable rates under § 206 of the Act." (App. 27). The Court below held this significant because the parties had acted to ". . . contractually eliminate the utility's right to make immediately effective rate changes under § 205 but leave unaffected the power of the Commission under § 206 to replace not only rates that are contrary to the public interest but also rates that are unjust, unreasonable, or unduly discriminatory or preferential to the detriment of the contracting purchaser." (App. 29).

The Court also held that the Commission could lawfully make retroactive to August 1, 1978, the date of its prior rate determination, the new rates established in its January 25, 1982 Order on Remand (App. 36-41). The Court conceded that on remand ". . . the Commission made an explicit finding (for the first time) that APS' pre-existing rates were not 'just and reasonable', and made the rates approved in its 1978 Order effective from August 1, 1978 so as to put the parties in the position they would have occupied had the Commission initially interpreted the contract as later

required by *Papago I*." (App. 27). The Court held that where an agency had erroneously treated a wholesale customer as being subject to Section 205 instead of Section 206, the equities were with the utility because the prospective rates authorized by Section 206(a) would not allow the company to earn the same return it would have earned, had the agency not made a mistake of law. Under such circumstances, the Court below viewed this Court's *Sierra* holding, 350 U.S. at 353, as a directive "to look to the substance of the requirements of § 206(a) rather than to its rigid formalities," (App. 37). It held that such substantive requirements were satisfied here because the Commission had adopted, by silence, an ALJ's initial decision holding the return earned by APS on service to PTUA to be "outside the zone of reasonableness" (App. 38). In addition, the Court made its own findings that "as a matter of law" rates under a particular contract yielding a return of one-half of one percent fall outside the zone of reasonableness, so that the Commission's 1978 determination that the proposed rates were reasonable amounted to a finding that the existing rates were not. (App. 39). In its view, the unique equities of this case removed it from the general rule that "it will ordinarily be an abuse of the Commission's discretion not to make the latter finding [that the contract rate is unlawful] explicit." (App. 41).

REASONS FOR GRANTING WRIT

Petitioner respectfully submits that the Court below should be reversed because it has clearly erred in deciding important federal questions in direct conflict with prior decisions of this Court and of other courts of appeals, and has construed Section 206(a) of the Power Act in a manner contrary to the intent of Congress. These departures from

the accepted and usual course of judicial proceedings call for *per curiam* reversal.

1. The decision below is in direct conflict with this Court's decisions construing the Power Act, *Sierra*, 350 U.S. 348, and the Gas Act, *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, (1956). The pertinent provisions of these two statutes have been held to be identical by this Court, *Sierra* at 353. The essence of the decision of the Court below, and of the Commission's Order on Remand which it affirmed, is that Section 206 of the Power Act authorizes the agency to replace contractual rates, and rate changing methods, if it can show either that the public interest so requires or that such action is needed to insure that the utility will earn an adequate return under the "just and reasonable" rate standard. (App. 28-30). The Court below based its decision that the Commission's interpretation of PTUA's contract was correct on the theory that there are three types of "contractual arrangements for rate revision" (App. 28) permitted by the Act and that "... the APS/PTUA contract adopted the last of these three [contractual] regimes." (App. 29-30). Therefore, the crucial and dispositive issue here is the scope of the Commission's power to issue orders, under Section 206 of the Act, for the purpose of modifying contracts on the basis of the third regime *(i.e.,* that the existing rate does not produce an adequate return to the utility).[4]

In both *Sierra* and *Mobile,* the wholesale customer opposed a unilateral rate increase filed with the Commission by its interstate supplier of electricity or gas. The customers argued that Section 205 of the Power Act and Section 4 of the Gas Act did not authorize changes in contract rates to be

[4]Thus, if this Court reverses this new interpretation of § 206(a), the contract interpretation of the Court below automatically falls.

made by the unilateral filing by a public utility of a new rate schedule or by an order of the Commission entered in a proceeding held thereon.[5] This Court agreed, holding that these Acts which deal with wholesale, rather than retail, transactions preserve the integrity of contracts on which vast investments have been made by wholesale customers and ultimate consumers. They neither enlarge nor detract from the powers natural gas companies and public utilities have, absent the Acts, to initially make, and change, rates. *Mobile*, 350 U.S. at 331-344.

Most importantly, this Court held that its interpretation of such Acts, while precluding the companies from unilaterally changing their contracts simply because it is in their private interests to do so, did not deprive them of an avenue of relief when their interests coincided with the public interest. This Court held that such "contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest." (*Id.*). *Sierra* specifically extended the doctrine of *Mobile* to the Power Act, *Sierra* at 353.

2. In addition to this conflict in principle, there is an equally direct conflict involving the type of findings necessary to satisfy the statutory condition precedent to the Commission's exercise of its power under Section 206(a). Section 206(a) requires a finding that the existing contract rate is "unjust, unreasonable, unduly discriminatory or preferential" before the agency can fix a new rate "to be thereafter observed." In its Order on Remand, the Commission expressly conceded—for the first time—that this requirement of Section 206 was applicable to PTUA. (App. 10). The Commission made no such finding in its August 1, 1978 Order which was issued on the premise that Section 206 did not apply to PTUA.

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[5]Such orders are made under Section 206 or Section 5. 350 U.S. 344.

The Commission found that the "just and reasonable" standard was incorporated in Section 206 and required that APS' "rates should be determined by reference to its fully allocated costs, consistent with the Commission's normal ratemaking methods." (App. 9). In other words, the Commission held APS entitled to earn the same just and reasonable rate of return on its Section 205 and 206 customers, and, applying that view of the proper standard, found that APS' earned rate of return under the existing contract rates on the service to PTUA would only be .552 percent. (App. 10, ftn. 4). The Court below agreed that the adequacy of the return APS earned on service to PTUA must be measured against the return earned on service to Section 205 customers (App. 37-40).

But, in *Sierra* at 353-355, this Court squarely rejected the Commission's effort to justify a finding that existing contract rates were unjust and unreasonable within the purview of Section 206(a) on the ground that such rates produced less than the stipulated reasonable rate of return. Thus, it held:

> In short, the Commission holds that the contract rate is unreasonable solely because it yields less than a fair return on the net invested capital. . . . That the purpose of the power given the Commission by § 206(a) is the protection of the public interest, as distinguished from the private interests of the utilities, is evidenced by the recital in § 201 of the Act that the scheme of regulation imposed 'is necessary in the public interest.' When § 206(a) is read in the light of this purpose, it is clear that a contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable to the public utility.

Consequently, the decision below is squarely in conflict with *Sierra*, and contrary to Congressional intent.

3. The decision below is in conflict with decisions of this Court and of the various courts of appeals (including prior decisions of the District of Columbia Circuit). This conflict stems from the retroactive application in *Papago II*, and in the simultaneously decided *Kansas Cities* case, by the Court below of the new law it made regarding the scope of the Commission's powers under Section 206(a) to fix just and reasonable rates without making any public interest findings to support such action. Thus, it made its new statutory interpretation applicable to contracts entered into at a time when neither the parties to the contract, nor the Commission, believed that there was any type of Section 206 contract other than a *Sierra* burden of proof contract. It is hornbook law that the law (including judicial precedents) existing at the time a contract is entered into becomes part of the contract as if it were expressly referred to or incorporated therein, *Wood v. Lovett*, 313 U.S. 362, 370 (1971); *Maryland National Park and Planning Commission v. Lynn*, 514 F.2d 829, 833 (D.C. Cir. 1975); *In Re Pringle Engineering and Manufacturing Co.*, 164 F.2d 299, 301 (7th Cir. 1948); *St. Paul's Mercury Indemnity Co. v. Rutland*, 225 F.2d 689, 692 (5th Cir. 1955).

The Court below candidly admitted that non-*Sierra* burden of proof Section 206 contracts did not exist at the time the contracts involved in *Papago II*[6] and *Kansas Cities* were made (723 F.2d at 87), and that the public interest standard of *Sierra* was automatically applicable in all Section 206 proceedings (*Papago II*, App. 32, ftn. 5). Thus, *Kansas Cities* held (at 87):

> Preliminarily, we must note our recognition that seeking to ascertain the parties' true contractual intent regarding whether their agreements belong in the second or third category is a search for a needle in a haystack in which there is good reason to believe no

[6]This contract was made 15 years after *Sierra* and before any change in its interpretation by the Commission.

needle exists. For at the time all of the contracts involved in this petition for review were concluded, it was not clearly understood that the third category existed. *The Supreme Court's opinion in FPC v. Sierra Pacific Power Co., supra, was thought by many, including the Commission itself, to permit only the public-interest standard in § 206 proceedings, see Carolina Power & Light Co.*, 47 F.P.C. 1, 4 (1972). It is quite probable, therefore, that *the parties to the present contracts not only had in mind no specific answer to the question here at issue, but did not even understand that the question could be asked.* Deciding whether to place their contracts in category two or category three may be more in the nature of a policy determination regarding application of *new law to existing contractual arrangements* than of a factual or legal conclusion regarding the meaning of contracts. (Emphasis added).

This error is one of fundamental importance to the administration of the Power Act. There are now 211 jurisdictional electric utilities. Each of these companies has at least one wholesale customer, and most have a plurality of wholesale customers. Many of these customers have Section 206 contracts which have engendered much litigation before the Commission[7] and the Courts[8] on whether the *Sierra*

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[7] *Illinois Power Co.*, 17 FERC ¶61,064 (1981); *Louisiana Power and Light Co.*, 14 FERC ¶61,075 (1981); *Missouri Power and Light Co.*, 7 FERC ¶61,160 (1979); *Southern California Edison Co.*, 53 FPC 921 (1975), affirmed *sub nom., Southern California Edison Co. v. FPC*, 535 F.2d 1325 (D.C. Cir. 1976).

[8] *Louisiana Power and Light Co. v. FERC*, 587 F.2d 671 (5th Cir. 1979); *Public Service Company of New Mexico v. FERC*, 628 F.2d 1267 (10th Cir. 1980), *cert den.*, 451 U.S. 907 (1981); *Papago II, supra; Kansas Cities, supra.*

burden applies. The retroactive application of the radically transformed new law made by the Court below to all wholesale customers previously enjoying *Sierra* status under their contracts, therefore, will have an adverse impact on a large number of wholesale electric power customers.

4. The decision below is in conflict with the decision of this Court in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981), and with the recent decision of the U.S.Court of Appeals for the Tenth Circuit in *Southern Union Gas Co. v. FERC*, 725 F.2d 99 (1984), regarding the filed rate doctrine and retroactive ratemaking. Under the "filed rate doctrine," the only rate which may be charged is the rate lawfully on file with the Commission at the time service is rendered by a regulated company. In this case, the rates for PTUA which were actually on file with the Commission for the period from August 1, 1978 to January 25, 1982 had been unilaterally failed by APS. However, the agency's action in permitting that rate filing to become effective had been effectively reversed by *Papago I*. Thus, the only valid filed rates in effect during that period were the preexisting contract rates set forth in the Power Supply Agreement between APS and PTUA. Consequently, in the present case this means that PTUA cannot lawfully be compelled to pay more than the contract rates. PTUA made this precise argument to both the Commission and the Court below, which rejected it without discussion.

However, in *Arkansas-Louisiana* this Court applied the filed rate doctrine to bar a state court suit seeking damages for an admitted breach of contract. It also held that the Gas Act bars a regulated seller from collecting any rate other than the one lawfully on file with the Commission, and prevents the Commission itself from retroactively imposing a rate increase for gas already sold. 453 U.S. at 578. Surely, if, as this Court held in *Arkansas-Louisiana*, a breach of

contract by the buyer does not justify creating an exception to the filed rate doctrine, the decision of the Court below making an exception to that doctrine to achieve the Commission's professed equitable goal of placing all parties in the same position they would have occupied if the agency had correctly ruled, in the first instance, that PTUA is a Section 206, rather than a Section 205, customer certainly is in conflict with *Arkansas-Louisiana*.

In *Southern Union*, 725 F.2d 99, 101-102, Southern Union, a natural gas distributor, had taken delivery of certain volumes of natural gas in violation of the Natural Gas Act. The Commission penalized Southern Union by directing that it pay a higher rate—which had never been on file with the Commission—for the gas illegally delivered to it over a four year period. On petition for review, the Court of Appeals rejected the Commission's argument that the "egregious nature of petitioner's illegal conduct" in violating the Natural Gas Act called for an exception to the filed rate doctrine laid down by this Court in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951). It held that the Commission cannot issue reparation orders under the Gas Act.[9] By contrast, the Court below permitted an exception to the filed rate and anti-retroactivity doctrines of the Act, in a case involving neither a breach of contract, *Arkansas-Louisiana*, nor a violation of the Act, *Southern Union*, for the sole purpose of retoactively increasing APS' earnings on service to PTUA. Thus, there is a clear conflict between the decision of another court of appeals and the decision of the Court below.

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[9]In *Sierra* this Court held that the Gas Act and the Power Act are *in pari materia*.

Last, but not least, the Court below in its zeal to do equity for APS exceeded its statutory powers under Section 313(b) of the Power Act "to affirm, modify, or set aside" the order of the Commission. Instead, it exercised the essentially *administrative* function of making its *own independent finding* that the existing contract rate was unreasonable, even though it expressly admitted that it ordinarily would not remedy the Commission's failure to make such a finding, but would reverse that agency for such an abuse of its discretion to make an explicit finding to that effect. *Papago II*, (App. 39-41); *FPC v. Idaho Power Company*, 344 U.S. 17, 21 (1952).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted and the decision below should be summarily reserved.

Respectfully submitted,

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